

**A The Owners of The Ship or Vessel Mt 'Rowan' v
 The Owners of The Ship or Vessel or Property
 'Singapura Timur'**

HIGH COURT (MALACCA) — ADMIRALTY IN REM NO 27-1 OF 2001
B LOW HOP BING J
9 APRIL 2003

Shipping and Navigation — Action in rem — Claim for damage lien — Whether the admiralty jurisdiction of the court could be invoked in respect of a vessel which was submerged on the seabed — Courts of the Judicature Act 1964 s 12(1)

C *Shipping and Navigation — Action in rem — Service of writ — Whether service of the writ by the diver appointed was a proper and valid service — Courts of the Judicature Act 1964 s 12(1) and (2) — Rules of the High Court 1980 O 70 r 7(3)*

**D The plaintiffs' vessel MT 'Rowan' and the defendants' vessel
 MV 'Singapura Timur' were involved in a collision in the Straits of
 Malacca ('the collision'). Shortly after the collision, MV 'Singapura
 Timur' sank and remained on the seabed. The plaintiffs claimed
 against the ship or vessel or property MV 'Singapura Timur' for
 alleged loss and damage sustained in the collision. An order was made
**E by the learned registrar on the plaintiffs' ex parte application,
 appointing a diver to effect service of the writ on the property
 MV 'Singapura Timur' which was lying on the seabed. The diver
 appointed by the sheriff served the writ. The defendants sought and
 succeeded in obtaining an order that the plaintiffs' writ, service thereof
 on the defendants and all subsequent proceedings be set aside or
 struck off with costs. The plaintiff appealed against the order. The
**F issues for determination in this appeal were: (i) whether the admiralty
 jurisdiction of this court could be invoked in respect of a claim by the
 plaintiffs against the defendants MV 'Singapura Timur' which was
 submerged on the seabed as a result of the collision; and (ii) whether
 service of the writ on MV 'Singapura Timur' by the diver appointed
G vide an order of the learned registrar was a proper and valid service.******

Held, allowing the appeal:

**H (1) Under the general law of the sea, four classes of claims were
 treated as giving rise to maritime liens on ship and one such class
 was collision damage. This was popularly called damage lien.
 That being the case, s 24(b) of the Courts of Judicature Act 1964
 ('the CJA') read with s 21(3) and (4) of the United Kingdom
 Supreme Court Act 1981 gave due recognition to a claim *in rem*
**I based on a maritime or damage lien (see pp 449B-D); *Halcyon
 Isle' Bankers Trust International Limited v Todd Shipyards
 Corporation* [1980] 2 MLJ 217 followed. The court has and can
 exercise jurisdiction in relation to this writ (see p 450E).****

- (2) The operative language contained in s 12(1) of the CJA, especially the words ‘there shall be such ... process servers ... as are appointed’ gave rise to no doubt or ambiguity whatsoever as Parliament in its wisdom had clearly expressed its intention in relation to the appointment of, eg process servers to assist the sheriff in the exercise of the latter’s functions including the service of this writ. Further, s 12(1) contains no express or implied prohibition against the appointment of any particular person to be, eg a process server or the tenure of such appointment. That being the case, the appointment may be a permanent, temporary or an ad hoc appointment, such as the appointment of the diver for the specific and sole purpose of effecting service of the writ. The operative words are sufficiently wide to allow an ad hoc appointment. This is a substantive provision which should be construed liberally and widely 9 (see pp 451G–452A). A
- (3) The inherent jurisdiction of the court includes all the powers that are necessary to fulfill itself as a court of law; to uphold, to protect, and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. These powers are very wide and would most certainly assist in the prevention of injustice, by making an order to appoint a diver to serve this writ in a manner consistent with the substantive provisions in s 12(1) and (2) of the CJA and the procedural law in O 70 rr 7(3) and 10 of the Rules of the High Court 1980 (see p 453B–D). B
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[Bahasa Malaysia summary]

Plaintif-plaintif kapal MT ‘Rowan’ dan defendan-defendan kapal MV ‘Singapura Timur’ terlibat dalam satu pelanggaran di Selat Melaka (‘pelanggaran tersebut’). Sejurus selepas pelanggaran tersebut, MV ‘Singapura Timur’ telah tenggelam ke dasar laut. Plaintif-plaintif telah menuntut terhadap kapal MV ‘Singapura Timur’ kerana kerugian dan kerosakan yang dikatakan telah dialami dalam pelanggaran tersebut. Satu perintah telah dibuat oleh pendaftar yang bijaksana terhadap permohonan ex parte plaintiff-plaintif, yang melantik seorang penyelam untuk menyampaikan writ tersebut ke atas MV ‘Singapura Timur’. Penyelam yang dilantik oleh sheriff tersebut telah menyampaikan writ tersebut. Defendan-defendan telah memohon dan berjaya memperoleh satu perintah agar writ plaintiff-plaintif, penyampaianya ke atas defendan-defendan dan semua prosiding berikutnya diketepikan atau dibatalkan dengan kos. Plaintif telah merayu terhadap perintah tersebut. Persoalan-persoalan yang perlu ditentukan dalam rayuan ini adalah: (i) sama ada bidang kuasa admiralty mahkamah ini boleh digunakan berhubung satu tuntutan oleh plaintiff-plaintif terhadap defendan-defendan MV ‘Singapura Timur’ yang sekarang ini terbenam di dasar laut akibat daripada pelanggaran; dan (ii) sama ada penyampaian writ ke atas MV ‘Singapura Timur’ oleh penyelam yang dilantik melalui satu F

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A perintah oleh pendaftar yang bijaksana adalah satu penyampaian yang betul dan sah.

Diputuskan, membenarkan rayuan tersebut:

- B (1) Di bawah undang-undang am tentang kelautan, empat kelas tuntutan dianggap sebagai menimbulkan lien-lien kelautan atas kapal dan salah satu kelas tersebut adalah ganti rugi perlanggaran. Ini dikenali sebagai ganti rugi lien. Jika begitu kesnya, s 24(b) Akta Mahkamah Kehakiman 1964 ('AMK') dibaca dengan s 21(3) dan (4) Akta Mahkamah Agong United Kingdom 1981 memberi pengiktirafan terhadap satu tuntutan *in rem* berdasarkan satu lien kelautan atau lien ganti rugi (lihat ms 449B-D); *Halcyon Isle' Bankers Trust International Limited v Todd Shipyards Corporation* [1980] 2 MLJ 217 diikuti. Mahkamah mempunyai dan boleh menggunakan bidang kuasa tersebut berkaitan dengan writ ini (lihat ms 450E).
- D (2) Bahasa yang tepat yang terkandung dalam s 12(1) AMK, terutamanya perkataan-perkataan 'there shall be such ... process servers ... as are appointed' tidak menimbulkan sebarang keraguan atau ketaksaan kerana Parliamen dengan jelas menyatakan niatnya berkaitan perlantikan, contohnya penyampai-penyampai proses untuk membantu sheriff dalam melaksanakan fungsi-fungsi sheriff termasuklah penyampaian writ ini. Tambahan pula, s 12(1) tidak mengandungi larangan nyata atau tersirat terhadap perlantikan orang tertentu untuk menjadi, contohnya seorang penyampaian proses atau tempoh memegang jawatan tersebut. Dalam keadaan sedemikian, perlantikan tersebut mungkin suatu yang tetap, sambilan atau ad hoc, seperti perlantikan penyelam tersebut untuk tujuan yang spesifik dan semata-mata untuk melaksanakan penyampaian writ tersebut. Perkataan-perkataan yang operatif adalah cukup luas untuk membenarkan satu perlantikan ad hoc. Ini adalah satu peruntukan substantif yang patut ditafsirkan secara liberal dan luas (lihat ms 451G-452A).
- G (3) Bidang kuasa sedia ada mahkamah ini termasuklah semua kuasa yang perlu untuk menjadikannya satu mahkamah undang-undang, untuk mengekalkan, untuk melindungi dan untuk memenuhi fungsi kehakiman dalam pelaksanaan keadilan menurut undang-undang dengan cara yang tetap, teratur dan berkesan. Kuasa-kuasa tersebut adalah amat luas dan sememangnya membantu dalam menghalang berlakunya ketidakadilan, dan dengan membuat satu perintah untuk melantik seorang penyelam untuk menyampaikan writ ini dengan cara yang konsisten dengan peruntukan substantif dalam s 12(1) dan (2) AMK dan undang-undang prosedural dalam A 70 kk 7(3) dan 10 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat ms 453B-D).]
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Notes**A**

For cases on claim for damage lien, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 797–971.

For cases on service of writ, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 968.

B**Cases referred to**

Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor [1997] 2 MLJ 775 (refd)

Alexander, The (1812) 1 Dods 278 (refd)

Aluminium Company of Malaysia Bhd v Ng Than Chai & Anor [1994] 3 MLJ 544 (refd)

C

Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Spendour' [1999] 6 MLJ 652 (refd)

'Beauty Orchid II', The; Pacific Corporation Traders v 'Beauty Orchid II' Owners & Ors [1977] 2 MLJ 83 (refd)

Burns, The (1907) P 137 (refd)

D

City of Mecca, The (1879) 5 PD 29 (refd)

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (refd)

Dan Sin Wah v Chan Hai Swee [1951] 17 MLJ 189 (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35 (refd)

E

Fordeco Nos 12 and 17, The; The owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship Mv Xin Hua 10 [2000] 1 MLJ 449 (refd)

Fothergill v Monarch-Airlines [1980] 3 WLR 209 (refd)

F

Halcyon Isle' Bankers Trust International Limited v Todd Shipyards Corporation [1980] 2 MLJ 217 (folld)

Harmer v Bell & Ors; The Bold Buccleugh (1851) 7 Moo PCC 267 (refd)

Jayasankaran v PP [1983] 1 MLJ 379 (refd)

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 (refd)

G

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)

Master, Officers and Crew of SS 'Hong Ho' v SS 'Hong Ho' (1929) SSLR 22 (refd)

Motor Emporium, The v V Arumugam [1933] MLJ 276 (refd)

H

Neptune, The (1824) 1 Hag Adm 227 (refd)

Northman v Barnet Council [1978] 1 WLR 221 (refd)

Ocean Jade, The [1991] 2 MLJ 385 (refd)

Ong Eng Chai v China Insurance Co Ltd [1974] 1 MLJ 82 (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)

I

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453 (refd)

- A *Robinson v Western Australian Museum* 16 ALR 623 (refd)
'Santorini I, The': Owners of Cargo carried in the Ship 'Santorini I' v Owners of the Ship and Other Persons Interested in the Ship 'Santorini I' [1994] 3 MLJ 709 (refd)
Tan Eng Choon v Tay Boon See [1980] 2 MLJ 290 (refd)
Tang Sung Mooi v Too Miew Kim [1994] 3 MLJ 117 (refd)
- B *Thermopyloe, Solomon & Anor, The v Guthrie & Co* (1890) 4 Ky 639 (refd)
United Hokkien Cemeteries, Penang v The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121 (refd)
Victor, The (1860) Lush 72 (refd)
- C *'Washi', The, ex parte John Watt* (1883) 2 Ky Ad 49 (refd)
Wong Pot Heng & Anor v Zainal Abidin Putih & Anor [1990] 2 MLJ 410 (refd)
Yap Chin Hock v Minister of Home Affairs & Anor and other applications [1989] 3 MLJ 423 (refd)

D **Legislation referred to**

Courts of Judicature Act 1964 ss 4, 12(1), (2), 20(1)(a), (b), (2)(d), (3)(b)(i), (ii), (iii), 24(b)

Criminal Procedure Code s 307(iv)

Powers of Attorney Ordinance 1949

E Rules of High Court 1980 O 10, O 12 r 7, O 70 rr 7(3), 10(1)(a), (b), O 92 r 4

Supreme Court Act 1981 [UK] ss 20, 21(3), (4), 22, 23, 24

Arun Krishnalingam (Sativale Mathew Arun) for the plaintiff.

Jainil Bhandari (Lee Ong & Kandiah) for the defendant.

F **Low Hop Bing J:**

APPEAL

- Several interesting and novel issues pertaining to practice and procedure were said to have been raised at the hearing of the defendants' application in encl 33 before the learned registrar, wherein the defendants had on 25 January 2002 sought and succeeded in obtaining an order that the plaintiffs' writ in rem ('this writ'), service thereof on the defendants and all subsequent proceedings be set aside or struck off with costs ('the said decision'). This appeal in encl 53 to me as judge in chambers was brought
- H by the plaintiffs against the said decision.

FACTS OF THE CASE

For the purposes of this appeal, the facts of the case are uncontroverted.

- I The unfolding of the narrative showed that on or about 28 May 2001, the plaintiffs' vessel MT 'Rowan' and the defendants' vessel MV 'Singapura Timur' were involved in a collision in the Straits of Malacca ('the collision'). Shortly after the collision, MV 'Singapura Timur' sank in the approximate

position of 01°58.5 lat 102°14.2 long and now remains on the seabed, and is presently still submerged underwater at a depth of 48m at the position where she sank.

By this writ, the plaintiffs claim against the ship or vessel or property MV 'Singapura Timur' for alleged loss and damage sustained in the collision.

On 11 June 2001, an order was made by the learned registrar on the plaintiffs' ex parte application dated 7 June 2001, appointing a diver to effect service of this writ on the property MV 'Singapura Timur'.

This writ was served on or about 21 June 2001 by the diver appointed by the sheriff by attaching a laminated waterproof plastic copy thereof on the outer portion of the superstructure viz 'starboard gangway' and 'midship railing' of MV 'Singapura Timur' while she laid on the seabed.

Vide letter dated 27 June 2001, the plaintiffs' solicitors gave notice to the defendants' solicitors that this writ has been served on MV 'Singapura Timur' at approximately 4.50pm on 21 June 2001 and also enclosed therewith a copy of this writ.

ISSUES FOR DETERMINATION

Respective learned counsel for both the plaintiffs and the defendants have apparently agreed that there are two issues for determination in this appeal. These issues may be formulated as follows:

- (i) whether the admiralty jurisdiction of this court can be invoked in respect of a claim by the plaintiffs against the defendants MV 'Singapura Timur' which is presently submerged at a depth of 48m on the seabed as a result of the collision in the Straits of Malacca; and
- (ii) whether service of this writ on MV 'Singapura Timur' by the diver appointed vide an order of the learned registrar is a proper and valid service.

Admiralty jurisdiction

In urging this court to invoke admiralty jurisdiction, Mr Arun Krishnalingam, learned counsel for the plaintiffs cited s 24(b) of the Courts of Judicature Act 1964 ('the CJA') read with s 20(1)(a), (b), (2)(d) and (3)(b); and s 21(3) of the United Kingdom Supreme Court Act 1981 ('the UK SCA').

He submitted that the plaintiff has a maritime lien or damage lien on MV 'Singapura Timur' and so may bring a claim *in rem* against that ship or property, which lien is not extinguished by a partial loss or destruction.

He added that MV 'Singapura Timur' lying on the seabed is a ship or property within the meaning of s 21(3) of the UK SCA.

Mr Jainil Bhandari, learned counsel for the defendants, contended that MV 'Singapura Timur' remaining on the seabed was a wreck and therefore

A not the proper subject of an action *in rem*, as the wreck could not come within the description of 'ship or property' under s 21(3) of the UK SCA.

He argued that the continued existence of MV 'Singapura Timur', ie the res or property is an essential condition precedent to the availability of any maritime lien for enforcement through an action *in rem* against that res or property, and that with the loss or destruction of the res or property, having been lost to the sea, all liens *in rem* would consequently be extinguished.

B He stressed that MV 'Singapura Timur' being a wreck cannot be encumbered with a damage lien and so no action can be maintained against MV 'Singapura Timur'.

C In my judgment, it is to be observed that although learned counsel for the defendant did not cite the order and rule pursuant to which he was applying to set aside or strike off this writ, it seems clear to me that O 12 r 7 of the Rules of High Court 1980 ('the RHC') was relied upon by him as that was the procedural rule enacted for this purpose.

D At the outset, it is necessary for me to restate our law relating to the exercise of admiralty jurisdiction by our courts.

E Earlier law reports published in our country revealed that since 1883 our courts have already exercised admiralty jurisdiction (see, eg *The 'Washi'*, *ex parte John Watt* (1883) 2 Ky Ad 49; *The Thermopyloe, Solomon & Anor v Guthrie & Co* (1890) 4 Ky 639; and *Master, Officers and Crew of SS 'Hong Ho' v SS 'Hong Ho'* (1929) SSLR 22.

F *Malaysian High Court Practice*, MLJ Issue 7 p 4539, explains that an action *in rem* is a real action in which a plaintiff claims that as against the whole world, the thing or res in dispute is his; and that an admiralty action *in rem* is actually directed against a res, eg a ship (see *The City of Mecca* (1879) 5 PD 29 at p 33; *The Burns* (1907) P 137; the cargo: *The Victor* (1860) Lush 72; *The Ocean Jade* [1991] 2 MLJ 385; or bunkers: s 21(3) UK SCA).

G Section 23 of the CJA provides generally for the jurisdiction of the High Court to try civil proceedings, while s 24 thereof contains specific provisions. Section 24(b) expressly states that the civil jurisdiction of the High Court shall include 'the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981.'

H The admiralty jurisdiction of the High Court of Justice in England is expressly provided for in ss 20 to 24 of the UK SCA.

I shall only refer to the sections in so far as they are relevant to this judgment.

I Section 20(1)(a), (b), (2)(d), (3)(b)(i), (ii) and (iii) of the UK SCA are reproduced as follows:

(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say —

- (a) jurisdiction to hear and determine any of the questions and claims mentionend in subsection (2);
- (b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);
- ...;
- (2) The questions and claims referred to in subsection 1(a) are —
- ...
- (d) any claim for damage received by a ship;
- (e) any claim for damage done by a ship;
- (3) The proceedings referred to in subsection (1)(b) are —
- (a) ...;
- (b) any action to enforce a claim for damage, loss of life or personal injury arising out of —
- (i) a collision between ships; or
- (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
- (iii) non-compliance, on the part of one or more of two or more ships, with the collision regulations; ...

That our High Court enjoys the same jurisdiction and authority in relation to matters of admiralty as that stated above in the UK SCA does not appear to be have been disputed by the parties herein, since the existence of such admiralty jurisdiction in Malaysia has never been doubted (see *The 'Beauty Orchid II'*; *Pacific Corporation Traders v 'Beauty Orchid II' Owners & Ors* [1977] 2 MLJ 83 per Arulanandom J; *The Santorini I: Owners of Cargo carried in the Ship 'Santorini I' v Owners of the Ship and Other Persons Interested in the Ship 'Santorini I'* [1994] 3 MLJ 709 per VC George J (as he then was); *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 (CA); *Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Spendour'* [1999] 6 MLJ 652 per Abdul Malik Ishak J; and *The Fordeco Nos 12 and 17; The owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship Mv Xin Hua 10* [2000] 1 MLJ 449.

However, the bone of contention by the parties herein is whether this admiralty jurisdiction can be invoked over MV 'Singapura Timur' when she is lying on the seabed.

Some illumination has been incorporated in s 21(3) and (4) of the UK SCA which provides as follows:

- (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action *in rem* may be brought in the High Court against that ship, aircraft or property.
- (4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where —
- (a) the claim arises in connection with a ship; and
- (b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

- A** an action *in rem* may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against —
- (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
- B** (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.'

Under s 21(3) and (4), it is clear to me that where there is a maritime lien, the plaintiff may bring an action *in rem* against that ship or property.

- C** In the '*Halcyon Isle*' *Bankers Trust International Limited v Todd Shipyards Corporation* [1980] 2 MLJ 217, Lord Diplock in delivering the majority judgment of the Privy Council held, *inter alia*, at p 219, that applying the general law of the sea, four classes of claims were treated as giving rise to maritime liens on ship and one such class is collision damage. This is popularly called damage lien.

- D** That being the case, s 24(b) of the CJA read with s 21(3) and (4) of the UK SCA gives due recognition to a claim *in rem* based on a maritime or damage lien.

- E** A damage lien attaches to the hull of the offending ship and also her appurtenances, that is, her tackle, apparel and furniture: *The Alexander* (1812) 1 Dods 278 referred to in *Maritime Liens* by DR Thomas, 1980, at p 135.

A seaman has a right to cling to the last plank of his ship in satisfaction of his wages or part thereof: per Lord Stowell in *The Neptune* (1824) 1 Hag Adm 227 at p 239.

- F** The judgment of Jervis CJ of the Privy Council in *Harmer v Bell & Ors; The Bold Buccleugh* (1851) 7 Moo PCC 267 has clearly expounded the nature of a maritime lien as follows:

- G** Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege on a thing to be carried into effect by legal process; and Story J (1 Summer 78) explains that process to be a proceeding *in rem*, and adds that wherever a lien or claim is given on the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches, and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course there a maritime lien exists, which gives a privilege or claim on the thing to be carried in to effect by legal process. This claim or thing travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.

- I** A partial loss or destruction does not have the effect of extinguishing the maritime lien for such a lien attaches to each and every part of the *res* and in the event of only a part or fragment of the original *res* surviving, the

maritime lien exists to a similar extent (see *Maritime Liens* by DR Thomas, 1980, at p 299).

A

The aforesaid grounds would have been sufficient to dispose of this issue relating to the jurisdiction of this court. However, *ex abundante cautela*, I have proceeded one step further to consider two additional questions in this particular case pertaining to total or partial loss or destruction; and the ambit of 'ship, property or wreck'.

B

In the instant case, whether MV 'Singapura Timur' is a total or partial loss or destruction is an issue which can only be decided at the full trial by way of mature consideration of viva voce evidence and not on mere affidavits.

C

Similarly, whether or not MV 'Singapura Timur' is a ship or property within s 21(3) of the UK SCA or a wreck outside its ambit, is another issue which can only be determined by reference to the cross-examination and re-examination of the witnesses at the full trial as affidavits alone cannot yield a definitive result.

D

At this juncture, it is pertinent to observe that in *Robinson v Western Australian Museum* 16 ALR 623, the High Court of Australia (which is the apex court there) has the occasion to hold, inter alia, that a Dutch vessel 'Gilt Dragon' and its contents sunk 287 nautical miles off the west coast of Australia in 1656, is maritime property over which the court has jurisdiction.

E

On the foregoing grounds, I am of the view that this court has and can exercise jurisdiction in relation to this writ. I am therefore unable to uphold the decision of the learned registrar.

Similarly, I cannot legally sustain the submission of the defendants' learned counsel.

F

Service of writ by sheriff's diver

It was canvassed for the plaintiffs that service of this writ by the sheriffs diver who was appointed by an order of this court is valid since O 92 r 4 of the RHC confers upon this court an inherent jurisdiction to do so, and since MV 'Singapura Timur' is lying on the seabed it was necessary to obtain an order of the court to enable the sheriff to appoint a diver to serve the writ on the sheriff's behalf, as there was a lacuna in the RHC.

G

The response of the defendants was that the order permitting the use of divers was *ultra vires* as O 70 r 7(3) of the RHC only allows the service of this writ to be carried out either by 'the sheriff or his officers', and that there can be no delegation of the sheriff's powers.

H

It was also raised for the defendants that the plaintiffs' argument based on inherent jurisdiction is flawed, as O 92 r 4 of the RHC is a procedural rule and is not intended to take away the substantive rights of the parties, and that recourse to inherent jurisdiction is not justified in the present case.

I

In my judgment, as O 70 of the RHC which regulates admiralty proceedings plays a pivotal role in the determination of the issue under this

- A head, I shall refer to the relevant and pertinent portion thereof, where necessary.

Order 70 r 7(3) of the RHC reads as follows:

- B Where by virtue of this rule a writ is required to be served on any property, the plaintiff must leave the writ and a copy thereof at the Registry and file therein a praecipe in Form 159; and where he does so the sheriff or his officer shall serve the writ on the property described in the praecipe. (Emphasis added.)

- C The service of a writ in rem under O 70 r 7(3) of the RHC is therefore entrusted to 'the sheriff or his officer' and the mode of service is contained in O 70 r 10(1)(a) and (b) of the RHC in the following words:

Service on ships, etc: How effected (O 70 r 10)

Subject to paragraph (2), service of a warrant of arrest or writ in an action *in rem* against a ship, freight or cargo shall be effected by —

- D (a) by affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure; and
(b) on removing the warrant or writ, leaving a copy of it affixed (in the case of the warrant) in its place or (in the case of the writ) on a sheltered, conspicuous part of the ship.

- E The question is now crystallized and it turns upon the task of statutory interpretation in order to ascertain the ambit and purview of the words 'the sheriff or his officer' in O 70 r 7(3) of the RHC.

Section 12(1) of the CJA provides that:

- F The Registrar of the High Court shall be the sheriff and there shall be such bailiffs, *process servers* and other subordinate officers *as are appointed* (Emphasis added.).

The sheriff or his officer shall execute all writs etc under s 12(2) thereof.

- G In a detailed commentary on s 12, the *Malaysian High Court Practice* MLJ Issue 7 at p 4538 explained that as registrar of the High Court, the sheriff may appoint, *inter alia*, process servers to assist him in carrying out his duties, one of which is to effect service of a writ *in rem* on the vessel (O 70 rr 7(3) and 10 of the RHC).

- H In my view, the operative language contained in s 12(1), especially the words 'there shall be such ... process servers ... as are appointed' can give rise to no doubt or ambiguity whatsoever as Parliament in its wisdom has clearly expressed its intention in relation to the appointment of, eg process servers to assist the sheriff in the exercise of the latter's functions including the service of this writ.

- I Further, s 12(1) contains no express or implied prohibition against the appointment of any particular person to be, eg a process server or the tenure of such appointment. That being the case, the appointment may be a permanent, temporary or an ad hoc appointment, such as the appointment of the diver for the specific and sole purpose of effecting service of this writ. The operative words are in my view sufficiently wide to allow an ad hoc

appointment. This is a substantive provision which should be construed liberally and widely.

The ad hoc appointment of the diver to serve this writ pursuant to an order of this court in the instant case would make the diver a process server for the purposes of s 12(1) and the diver would then be an officer of the sheriff. The diver as such officer of the sheriff shall have the power to execute this writ under s 12(2) which is another substantive provision.

It must be observed that under s 4 of the CJA, the CJA is only less supreme than the Federal Constitution, but overrides all other written laws in the event of any inconsistency or conflict, as seen in these words:

- (4) In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

My interpretation of s 12(1) and (2) and O 70 rr 7(3) and 10 of the RHC is in my view fortified by the strongly entrenched rule of interpretation taking the shape of purposive interpretation, because to interpret otherwise would defeat the legislative purpose thereof and result in an absurdity and injustice which should be avoided by the use of good and indeed common sense to remedy it. The avowed purpose of enacting s 12(1) and (2) and O 70 rr 7(3) and 10 of the RHC is manifestly to promote, permit, enable or empower rather than to obstruct, prohibit, restrict or frustrate the service of this writ by the sheriff or his officers, and the liberal purposive approach adopted by me above is to conduce to or promote the general legislative purpose as enacted in these provisions.

The purposive approach of statutory interpretation has been adopted and applied in England since the 17th century as it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': Coke 4 Inst 330, as referred to by Chang Min Tat FJ (as he then was) in *United Hokkien Cemeteries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121 (FC), following Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 and Lord Denning MR in *Northman v Barnet Council* [1978] 1 WLR 221.

This purposive approach has been consistently applied by our courts in the interpretation of statutes (see, eg per Wan Yahya (later FCJ) in *Tan Eng Choon v Tay Boon See* [1980] 2 MLJ 290 at p 291 (HC); and per Edgar Joseph Jr J (later FCJ) in *Yap Chin Hock v Minister of Home Affairs & Anor and other applications* [1989] 3 MLJ 423 (HC); *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 (SC); *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (SC); *Wong Pot Heng & Anor v Zainal Abidin Putih & Anor* [1990] 2 MLJ 410 (SC) referring to *Fothergill v Monarch-Airlines* [1980] 3 WLR 209 (HL); *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; and *Aluminium Company of Malaysia Bhd v Ng Than Chai & Anor* [1994] 3 MLJ 544 (HC).

Section 12(1) and (2) of the CJA and O 70 rr 7(3) and 10 of the RHC are capable of dispensing with the invocation of the inherent jurisdiction

A of the court as there is in my view no lacuna whatsoever. However, in the light of the strenuous submissions by both the learned counsel, it is appropriate for me to consider and proffer my view. Order 92 r 4 of the RHC reads:

Inherent powers of the Court (O 92 r 4)

B For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

C The inherent jurisdiction of the court includes all the powers that are necessary to fulfill itself as a court of law; to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner: per Edgar Joseph Jr J (later FCJ) in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 147; see also *The Motor Emporium v V Arumugam* [1933] MLJ 276, both of which were referred to in *Malaysian High Court Practice* MLJ 2001 Issue 10 at p 5760.

D These powers are very wide and in my view would most certainly assist in the prevention of injustice, by making an order to appoint a diver to serve this writ in a manner consistent with the substantive provisions in s 12(1) and (2) and the procedural law in O 70 r 7(3) and r 10 of the RHC.

E I therefore hold that the defendants' contention in relation to the inapplicability of O 92 r 4 of the RHC is devoid of merits.

F Further, the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself) applies here. When the court-appointed diver effected service of this writ, it was in practice done at the instance of the sheriff and so the act of effecting such service is to be attributed to the sheriff who is deemed in law to do it himself, under O 70 rr 7(3) and 10 of the RHC.

Illustrations of the application of this maxim abound in the cases which came up for consideration and determination by our courts.

G In *Dan Sin Wah v Chan Hai Swee* [1951] 17 MLJ 189 at p 193, Briggs J held that the execution of a document by a donee of a power of attorney granted pursuant to the Powers of Attorney Ordinance 1949 was an execution by the donor.

H An insurance agent who was authorized to fill in and sign a proposal form was held to have done so on behalf of the policy holder, as the legal relationship of principal and agent was created in respect of the proposal form to effect the insurance in question: per Hashim Yeop A Sani J (later CJ (Malaya)) in *Ong Eng Chai v China Insurance Co Ltd* [1974] 1 MLJ 82.

I This maxim is an expression of the principle governing vicarious liability: per Raja Azlan Shah FJ (as he then was then) in *Karthikeyani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC). There a car owner was held liable because he has authorized or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. This Federal Court decision was followed

by the Court of Appeal in *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor* [1997] 2 MLJ 775 at p 781.

The Federal Court in *Jayasankaran v Public Prosecutor* [1983] 1 MLJ 379 held that a petition of appeal filed and signed by the solicitor in respect of an appeal against conviction under s 307(iv) of the Criminal Procedure Code was held to have complied with the relevant portion of s 307(iv) which reads, 'the appellant shall lodge ... a petition of appeal ...'. Although s 307(iv) provides only for the appellant to file the petition of appeal and made no reference at all to the filing by the solicitor, the Federal Court held that the law does not provide for the appellant to do so 'personally' or 'in person'.

Therefore, the solicitor filing and signing the petition of appeal would suffice as it attracts the maxim *qui facit per alium facit per se*.

CONCLUSION

At this stage, I must record my appreciation to both the learned counsel for their relentless resilience in producing elaborate submissions and also to the learned registrar for his painstaking effort shown in his grounds of decision.

On the foregoing grounds, I hold that the answers to both the aforesaid issues for determination are in the affirmative, and that there are merits in the plaintiffs' appeal which I hereby allow with costs to be taxed after the full trial of the suit herein. The learned registrar's said decision is here by set aside.

Appeal allowed.

Reported by Peter Ling

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